

1 UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF WISCONSIN

3 -----  
4 UNITED STATES OF AMERICA, )  
5 )  
6 Plaintiff, ) Case No. CR 06-320  
7 ) Milwaukee, Wisconsin  
8 vs. ) May 13, 2008  
9 ) 2:37 p.m.  
10 DAVID OLOFSON, )  
11 )  
12 Defendant. )  
13 -----

14 **TRANSCRIPT OF SENTENCING HEARING**  
15 BEFORE THE HONORABLE CHARLES N. CLEVERT, JR.  
16 UNITED STATES DISTRICT JUDGE

17 APPEARANCES:

18 For the Plaintiff  
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Proceedings recorded by mechanical stenography, transcript  
produced by computer aided transcription.



1 P R O C E E D I N G S (2:37 p.m.)

2 THE CLERK: Case Number 2006-CR-320, United States of  
3 America v. David Olofson. This matter is before the Court for  
4 sentencing. May we have the appearances, please?

02:38 5 MR. HAANSTAD: Good afternoon, Your Honor, Gregory  
6 Haanstad for the United States. Also with me at counsel table  
7 is Special Agent Jody Keeku from the Bureau of Alcohol, Tobacco  
8 and Firearms.

9 THE COURT: Good afternoon.

02:38 10 PROBATION OFFICER: Good afternoon, Your Honor, Cindy  
11 McHenry on behalf of the United States Probation Office.

12 THE COURT: Go to see you, Ms. McHenry.

13 MR. FAHL: Good afternoon, Your Honor, Brian Fahl and  
14 Brian Mullins, Federal Defender Services, appear on behalf of  
02:38 15 David Olofson who appears today in person.

16 THE COURT: Good afternoon to you as well.

17 The Court would like to begin by addressing the  
18 defendant's motion for a judgment of acquittal, as well as his  
19 motion concerning disclosure. Perhaps the disclosure motion  
02:38 20 should be discussed first.

21 Is there anything that either side wishes to add to  
22 consideration of that motion?

23 MR. FAHL: No, Your Honor, I believe the briefing  
24 takes care of the issues related to that motion.

02:39 25 MR. HAANSTAD: The government has nothing to add in

1 addition to the argument it submitted, Your Honor.

2 THE COURT: Well, as an initial matter in reviewing  
3 the defendant's motion for disclosure it must be pointed out  
4 that the court previously considered the issues raised by the  
5 defendant in this motion for disclosure.

02:39

6 After trial the defendant is obviously renewing his  
7 request for disclosure of information concerning the Olympic  
8 Arms SGW rifle at issue in this case, and it is essentially the  
9 defendant's request that the government be required to produce a  
10 letter which was sent to Olympic Arms. The Court denied that  
11 request previously and the Court will deny the request this time  
12 as well.

02:39

13 Mr. Olofson seeks to compel the disclosure of a copy  
14 of any and all correspondence between the Bureau of Alcohol,  
15 Tobacco and Firearms and SGW/Olympic Arms concerning SGW Olympic  
16 Arms' use of M-16 parts in production of its AR-15 weapon since  
17 1980 and 1990, particularly the use of M-16 triggers, hammers,  
18 disconnectors and selectors.

02:40

19 Mr. Olofson maintains that the government's position  
20 in this case is incorrect. Moreover, he asserts now that this  
21 letter is exculpatory because it contradicts evidence elicited  
22 by the government during the course of his trial and was central  
23 to the government's theory in this case.

02:40

24 Mr. Olofson has also submitted to the Court a  
25 memorandum regarding any correspondence between the Bureau of

02:41

1 Alcohol, Tobacco and Firearms and Scheutzen Gun Works or Olympic  
2 Arms concerning SGW/Olympic Arms' use of M-16 parts in the  
3 production of its AR-15 type disconnectors, type weapons between  
4 1980 and 1990, particularly the use of triggers, M-16 triggers,  
02:41 5 hammers, disconnectors and selectors.

6 The reasons that this information is exculpatory,  
7 because of, one, it contradicts the testimony of Officer Kingery  
8 of the Bureau of Alcohol, Tobacco and Firearms.

9 Additionally, that it contradicts the government's  
02:42 10 theory that the combination of four parts cause the weapon in  
11 this particular case to fire multiple rounds.

12 A letter from ATF, Federal Firearms Licensing News  
13 issued in the fall of 1986, notes that AR-15 rifles have been  
14 manufactured with M-16 parts.

02:42 15 Nonetheless, it was not necessary and crucial to the  
16 government's case to establish that the weapon in this case was  
17 manufactured with M-16 parts. What was and remains crucial is  
18 the requirement that the rifle in question met the definition of  
19 the statutes; that is, it was crucial that the government  
02:43 20 establish that the weapon in this particular case could fire  
21 automatically more than one shot without manually reloading by a  
22 single function of the trigger.

23 Having said that, the Court does not believe that the  
24 record would require it to delay this proceedings and so that  
02:44 25 that particular information can be reviewed either directly by

1 defense counsel or by the Court.

2 Having said that, the Court is mindful that the  
3 government has suggested that it could offer up this particular  
4 document for in-camera inspection. So I will interrupt my  
02:44 5 remarks to ask whether under the circumstance the government  
6 believes the Court should delay at least momentarily for the  
7 purpose of reviewing any such document or documents if they are  
8 here in court and available for consideration.

9 MR. HAANSTAD: Yes, Your Honor, the government does  
02:44 10 have the one responsive document here in court today.

11 Our understanding of Section 6103 is that if the court  
12 were to order production of that document for in-camera  
13 inspection, the government could then disclose it and not  
14 violate Section 6103. The government maintains its position  
02:45 15 that nothing that the defense has so far suggested indicates why  
16 it is that that particular letter is exculpatory, and, in fact,  
17 the government maintains that the letter is not exculpatory.

18 If, however, the Court thinks that the defendant has  
19 raised some sort of -- made some sort of threshold showing, the  
02:45 20 government is able and would be willing at this time to provide  
21 that document for in-camera inspection.

22 THE COURT: Well, I'd like to hear the response of the  
23 defense in that regard.

24 MR. FAHL: Your Honor, not knowing the contents of the  
02:45 25 letter it's hard for me to speak as to whether or not it is or

1 could be exculpatory. I think that the government is right that  
2 this court can review in camera, we would request that it do so.  
3 Understanding that this court has already determined that the  
4 presence of the four parts would not -- if this document simply  
02:46 5 indicates that it had these four parts, these four M-16 parts,  
6 that that does not make it exculpatory, there still may be  
7 additional information in the document concerning what the  
8 combination of those four parts does, if it creates a  
9 malfunction and what the ATF's official position is when a  
02:46 10 malfunction occurs based on these four parts.

11 If information like that is present in the memo I  
12 think it would be exculpatory and then should be disclosed.  
13 However, not knowing the contents I can't speak fully to that.

14 THE COURT: Well, I'm not satisfied that your theory  
02:47 15 with respect to what the Bureau of Alcohol, Tobacco and  
16 Firearms' position may be is crucial to any final determination  
17 in this case, keeping in mind that it was the jury which had the  
18 definition of a machine gun for consideration along with all of  
19 the evidence in the matter, and the jury did not consider what  
02:47 20 theory -- did not consider what position the Bureau of Alcohol,  
21 Tobacco and Firearms may have with respect to weapons generally.  
22 That was not presented as part of the evidence in this case.

23 MR. FAHL: But if the ATF had a position, a specific  
24 position about SGW/Olympic Arms AR-15 rifles manufactured in the  
02:47 25 time Mr. Olofson's was, and whether or not those constitute

1 machine guns, even if they multiple fire, that I think would be  
2 relevant and something the jury should have considered.

3 THE COURT: Well, it may very well be something that  
4 you feel the jury should have considered but at this juncture  
02:48 5 I'm not satisfied that the record would support your conclusion  
6 that it would be exculpatory to have that particular document or  
7 several such related documents offered and considered during the  
8 course of the trial.

9 Nonetheless, out of an abundance of caution and for  
02:48 10 the sake of completeness of the record, the Court will direct  
11 the government to produce any such materials which would be  
12 covered by your motion if they are available in court at this  
13 time.

14 MR. HAANSTAD: They are, Your Honor.

02:48 15 THE COURT: Please offer them up.

16 MR. HAANSTAD: Your Honor, the government is producing  
17 the one letter that ATF found that was responsive to the request  
18 contained in the defendant's motion for discovery.

19 THE COURT: What is the next exhibit number in this  
02:49 20 matter? I will give it an exhibit number for identification  
21 purposes.

22 This document will be designated as Exhibit Number 14  
23 for in-camera inspection.

24 It is a document on the letterhead of the Department  
02:50 25 of Treasury, Bureau of Alcohol, Tobacco and firearms, and it

1 bears the date of 31 May 1983. And it is over the signature of  
2 an assistant director for regulatory enforcement.

3 The Court has reviewed the document. It is in my view  
4 clearly not of a nature that would make it exculpatory. It  
02:51 5 deals with M-16 type components as well as the AR-15 type  
6 receivers, but it is in no way exculpatory or required to be  
7 disclosed by the government in this case. Nonetheless, I will  
8 maintain this document which has been identified under seal in  
9 the court record.

02:52 10 Next the defendant argues that he should have a new  
11 trial. Does the defendant wish to add to the remarks set forth  
12 in his submissions?

13 MR. FAHL: No, Your Honor.

14 THE COURT: Does the government?

02:52 15 MR. HAANSTAD: No, Your Honor, thank you.

16 THE COURT: The defendant's request for a new trial  
17 rests primarily upon his claim that there was newly discovered  
18 evidence which contradicts the government's position. The new  
19 evidence obviously was the information which was just tendered.

02:53 20 Inasmuch as that information is not exculpatory and  
21 would not have made a difference in the trial, or the, in this  
22 court's view, the ability of the jury to reach the verdict of  
23 guilty in this case, there is no basis for the court to grant a  
24 new trial based upon newly discovered evidence.

02:53 25 A defendant must show that he became aware of this



1 so-called new evidence only after trial and he could not have  
2 discovered the evidence by due diligence any sooner; that the  
3 evidence is material and that the evidence would probably have  
4 led to acquittal in the event of a new trial.

02:54 5 Again, as stated, the Court has concluded, after  
6 reviewing this so-called new evidence which the government  
7 obviously did not present to the defense prior to today's date  
8 or at any time during the course of the trial, and the Court has  
9 concluded that that material would not have affected the outcome  
02:54 10 of this case. Hence, the new trial motion has not been  
11 sustained and the same must be denied.

12 Next, I turn to the defendant's motion for a judgment  
13 of acquittal. Does the defense wish to be heard in that regard?

14 MR. FAHL: No, Your Honor. The briefing is  
02:55 15 sufficient, Your Honor.

16 THE COURT: Does the government?

17 MR. HAANSTAD: The government has nothing to add to  
18 its earlier submissions, Your Honor.

19 THE COURT: Well, then, considering the motion for  
02:55 20 judgment of acquittal the Court went back and reviewed the  
21 transcript and the evidence. One piece of evidence was the  
22 video which was shown to the jury and considered during the  
23 course of the trial. I'd like to run that video at this time.

24 You may proceed.

02:56 25 (Video file played in open court.)

1 THE COURT: Having seen that I moved then toward  
2 further consideration of the defendant's arguments. It's the  
3 position of Mr. Olofson that no rational jury could find he  
4 knowingly transferred a machine gun, and that Section 5845(b) of  
03:01 5 Title 26 which defines a machine gun is unconstitutionally  
6 vague.

7 A federal grand jury returned a one count indictment  
8 in this case charging that on or about July 13, 2006, in the  
9 State and Eastern District of Wisconsin, this defendant, David  
03:01 10 R. Olofson, knowingly transferred a machine gun. The firearm  
11 involved in this offense was an Olympic Arms .223 caliber SGW  
12 Rifle, model CAR-AR, bearing serial number F-as-in-frank 7079,  
13 all in violation of Title 18, United States Code, Sections  
14 922(o) and 924(a)(2).

03:02 15 Title 18, Section 922(o) defines a machine gun as any  
16 weapon which shoots, is designed to shoot, or can be readily  
17 restored to shoot automatically more than one shot without  
18 manual reloading by a single function of the trigger. The Court  
19 observed the test as did the jury. Now, I do note that there  
03:03 20 were two parts of this test and I believe during the trial the  
21 latter was what was shown; is that correct?

22 MR. HAANSTAD: Your Honor, there were actually three  
23 tests overall of this particular gun. One I believe was in  
24 October of 2006. That one was not videotaped. One was later in  
03:03 25 2006, that test also was not videotaped. This particular test

1 fire, this third test fire is the only one that was videotaped  
2 and that was conducted in February of 2007.

3 THE COURT: I do not recall clearly whether both  
4 segments of the DVD were shown, but I do know the portion where  
03:03 5 the agent had each person identify himself or herself was indeed  
6 shown; is that correct?

7 MR. HAANSTAD: That's correct, Your Honor, and  
8 actually the entire DVD on both segments were shown at trial.

9 THE COURT: I do recall clearly the portion respecting  
03:04 10 the firing where the agent mentioned the 20 rounds was in fact  
11 shown.

12 But regardless, the video shows the weapon firing  
13 multiple times on what appear to have been a single depression  
14 of the trigger.

03:04 15 Nonetheless -- or a single function of the trigger.

16 Nonetheless, Mr. Olofson argues that the definition of  
17 a machine gun is not fluid, it is either a machine gun or it is  
18 not a machine gun, if it isn't a machine gun, if it fires  
19 automatically once or twice.

03:05 20 In support of all of this Mr. Olofson cites Officer  
21 Kingery's testimony and argues that Kingery testified that the  
22 rifle exhibited a malfunction called hammer follow-through,  
23 where the hammer follows the bolt carrier as it chambers another  
24 round and accidentally strikes the newly chambered round of  
03:05 25 ammunition.

1           When soft ammunition was used the weapon fired  
2 multiple rounds with a single pull of the trigger. Again, I am  
3 quoting the argument of the defense.

4           Next, the defendant continues: Kingery also testified  
5 that the SGW Olympic Arms AR-15's were manufactured with some of  
6 those M-16 parts.

7           Further, defendant submits: Defense expert Len Savage  
8 testified that he had contacted Bob Schuetzen, that's  
9 S C H U E T Z E N, owner of Olympic Arms, and that during that  
10 same period AR-15 rifles had been manufactured with an M-16  
11 trigger, hammer, disconnect, and selector. While these parts do  
12 not create a machine gun, they may contribute to a malfunction.

13           I note here Mr. Savage did not testify from firsthand  
14 knowledge. He was utilizing hearsay.

15           Continuing: Defendant asserts his conversion book --  
16 that is a document which was received in evidence -- stated that  
17 an auto sear, S E A R, must be added and there is no evidence  
18 that an auto sear was used in this case.

19           Moreover, there was no M-16 bolt carrier which was  
20 required to convert the AR-15 to a machine gun.

21           Earlier today the defendant submitted a letter to the  
22 Court with a transcript of a proceeding from the Western  
23 District of Pennsylvania. That proceeding was -- involved a  
24 defendant by the name of James P. Corcoran, C O R C O R A N, in  
25 criminal case 88-11. It was before U.S. District Judge Donald

1 Ziegler on April 5th of 1988.

2 In that case the Court indicated: The auto sear,  
3 known by various trade names including AR-15 auto sear, drop-in  
4 auto sear and auto sear 2, is a combination of parts designed  
03:08 5 and intended for use in converting a weapon to shoot  
6 automatically more than one shot without manually reloading by a  
7 single function of the trigger. Consequently, the auto sear is  
8 a machine gun as defined by 26 United States Code, Section 5845  
9 -- I'm sorry, I'm talking here about ATF ruling 81-4.

03:09 10 In light of that ruling Judge Ziegler concluded it was  
11 inescapable that without the auto sear the AR-15 is not a  
12 machine gun and need not be registered.

13 It should be noted that this reference to the ATF  
14 ruling 81-4 is not something new in this case. There was  
03:09 15 testimony respecting the same. Indeed, Special Agent Kingery  
16 was asked whether or not he was familiar with this ruling and  
17 said yes, he had, and he went on to summarize the ruling  
18 essentially by saying 81-4 refers to drop-in auto sears in  
19 conjunction with a combination of M-16 machine gun fire control  
03:10 20 components.

21 He was then asked essentially, is it correct to say  
22 that the addition of the auto sear to an AR-15, and it can be an  
23 AR auto sear, drop-in auto sear or an auto sear 2, when you add  
24 that to a machine gun with the M-16 internal parts, that's what  
03:10 25 makes it a machine gun, correct?

1           He responded: No, sir, not as you just asked the  
2 question. If it's a machine gun it's a machine gun. If you add  
3 them to an AR semiautomatic rifle, they would make that  
4 semiautomatic rifle a machine gun.

03:10 5           Further, Agent Kingery testified that an auto sear is  
6 not required before ATF will determine that a firearm is a  
7 machine gun.

8           Giving further consideration to the defendant's  
9 argument that there was insufficient evidence and that the  
03:11 10 weapon in this case merely malfunctioned, the Court notes the  
11 following evidence:

12           A witness and customer of Mr. Olofson testified that  
13 in March or April of 2006 he responded to an ad that Mr. Olofson  
14 placed on the bulletin board of a Subway restaurant located  
03:11 15 within a gas station in Berlin, Wisconsin. When the customer  
16 responded to the ad which offered to sell an AR-15 Colt, he  
17 spoke with the defendant Mr. Olofson who said the AR-15 was gone  
18 but that he could get him another one. Olofson indicated that  
19 he could order it, all the parts, the kit. According to the  
03:12 20 customer Olofson said he could put it together. As a result,  
21 Olofson and the customer planned to put the AR-15 together in  
22 Olofson's basement which contained, as the witness described,  
23 guns, gun parts, and ammunition.

24           Now, while awaiting on the kit, Olofson loaned the  
03:12 25 customer an AR-15 four times for periods of approximately two

1 weeks. He also, that is Olofson also provided the customer with  
2 free ammunition. And I'll come back to that later.

3 Olofson gave the customer 100 rounds on each of the  
4 first three occasions. On the latter occasion he gave the  
03:13 5 customer 500 rounds.

6 The customer then went to the Conservation Club in  
7 Berlin, Wisconsin when he observed that the borrowed weapon  
8 contained a selector switch with three positions, which are:  
9 Safety, fire, and unmarked.

03:13 10 Now, Olofson had informed the customer that he knew  
11 that it was an automatic function. Olofson mentioned to the  
12 customer that he had fired the weapon in the three-round burst  
13 position and the weapon had jammed on him. There Olofson is  
14 stating that he not only operated this rifle in the automatic  
03:14 15 mode, but he had done so prior to turning it over to this  
16 customer for firing.

17 Now, when the customer was at the Conservation Club on  
18 July 13, 2006, he placed the weapon into the unmarked position  
19 and testified that he -- that it shot three rounds or four  
03:14 20 rounds when he pulled the trigger, and that he did this at least  
21 twice, and that it jammed while his finger was on the trigger.

22 Subsequently, that is, later that day, local police  
23 responded to a phone call that there was automatic machine gun  
24 fire in the area. They spoke with the customer, that is, the  
03:15 25 person to whom Olofson had delivered the weapon in question,

1 there at the Conservation Club. They took down the serial  
2 number of the weapon. And, they also looked at two other guns  
3 that this customer had with him at the Conservation Club. They  
4 then told the customer that they wanted to make sure that the  
03:15 5 weapons had not been stolen.

6 The local police advised the customer and several of  
7 his friends who were there at the Conservation Club that someone  
8 had called in and said that there was automatic machine gunfire.  
9 The police then asked if he was the person doing that and the  
03:15 10 customer responded yes.

11 Then, the officers took Mr. Olofson's AR-15 and then  
12 contacted the Bureau of Alcohol, Tobacco and Firearms.

13 On the 16th of July, the Bureau of Alcohol, Tobacco  
14 and Firearms contacted Mr. Olofson after receiving a call from  
03:16 15 the Berlin Police Department. During his interview by the ATF,  
16 Mr. Olofson commented that he had owned an Olympic Arms .223  
17 caliber SGW Rifle, model CAR-AR, with serial number F7079 and  
18 lent it to the customer so the customer could maintain his  
19 firearm skills.

03:16 20 The customer was planning to purchase a firearm kit  
21 through Olofson and they were going to assemble it.

22 And this is according to Mr. Olofson's statement to  
23 the BATF agent.

24 Olofson further advised that he had loaned firearms to  
03:17 25 numerous people and that he did not keep records of who he had



1       loaned firearms out to because it would be dangerous.

2               Finally, Mr. Olofson told the agent that he knew what  
3       a machine gun was and that he knew how to convert a nonautomatic  
4       rifle into a machine gun.

03:17 5               At some point, subsequent to the initial contact at  
6       the Conservation Club, the local police contacted Mr. Olofson's  
7       customer who mentioned that -- I should say at some point after  
8       the police contacted Mr. Olofson's customer, the customer  
9       contacted Mr. Olofson and mentioned that he had spoken to the  
03:18 10       police, and he told Mr. Olofson what had happened and mentioned  
11       that the local police had mentioned that the gun had been firing  
12       automatically and Olofson responded to his customer he's never  
13       had trouble with the police while shooting an automatic gun at  
14       the Conservation Club in Berlin.

03:18 15               During trial there was documentary evidence and of  
16       course the video that we just viewed. The documentary evidence  
17       included a PDF document which was located on Mr. Olofson's  
18       computer hard drive. It's entitled, AR-15 to M-16 Conversion  
19       Books.

03:19 20               Within that document there's a discussion at page 10  
21       regarding the four AR-15 parts to be discarded: the bolt  
22       carrier, the hammer, the trigger, the selector, and the  
23       disconnecter.

24               Also found on the computer hard drive was an e-mail  
03:19 25       exchange dated June 28th, 2005 in which there was some

1 give-and-take between Mr. Olofson and someone else over M-16  
2 associated weapons and parts.

3 Yet another e-mail included a statement by a person  
4 who asked Mr. Olofson regarding untaxed registering of a machine  
03:20 5 gun, and Mr. Olofson said in response, and this is a quote:

6 MG's are just the small toys one can get. Remember,  
7 as a sovereign you are unhindered by the regulations that the  
8 federal citizens have to follow. There is a separate set of  
9 paperwork dealers must fill out to cover their, J G R E, butts  
03:20 10 on where the weapons and other items went. That is what a  
11 sovereign alien I.D. number does for him. It's just a way of  
12 accounting for where it went. Yes, you can build any weapon you  
13 like. You can learn more, especially details on the paperwork.  
14 You should learn more about sovereignty first. After some basic  
03:21 15 knowledge we will walk you through everything the first time to  
16 help you get the hang of it. Finding real freedom for the first  
17 time is like a baby's first step. You haven't really done it  
18 before so you don't know what it's like. But we can change  
19 that. Then you can literally do most anything you want so long  
03:21 20 as it interferes with no other's rights or person. Near  
21 Wisconsin by chance?

22 That's Exhibit 11.

23 The jury also heard the special agent who examined the  
24 gun, who testified that the AR-15 rifle had been assembled with  
03:21 25 four machine gun components: the trigger, the hammer, the

1     disconnecter and the selector switch. These four components  
2     installed on the AR-15 would allow the weapon to fire  
3     automatically.

03:22 4             He added that it is not necessary to discard and  
5     replace all five AR-15 parts identified in Mr. Olofson's  
6     conversion manual.

03:22 7             It was also pointed out, as Mr. Olofson has  
8     maintained, that there was a malfunction of the weapon which was  
9     loaned to Mr. Olofson's customer, and that in the test performed  
10    by ATF in October of 2006 the rifle did not fire automatically  
11    because military grade ammunition had been used and it has a  
12    much harder primer than standard civilian ammunition. As  
13    Mr. Haanstad has noted, there were two other tests the results  
14    of which have already been discussed.

03:23 15            The special agent added that he was aware that SWG/  
16    Olympic Arms manufactured its rifles with internal M-16 parts  
17    but testified that they never used this combination of M-16  
18    parts, that is, SWG never used such combination.

03:23 19            There was further testimony by the agent that there  
20    was no malfunction of the AR-15 rifle after examining the parts.  
21    If there had been a malfunction he would expect to see that the  
22    hammer had been worn, significantly rounded, or the spaces  
23    between them would have been opened up such that the parts would  
24    not function as capturing the hammer.

03:24 25            Mr. Olofson has placed considerable reliance on a

1 Supreme Court case, United States vs. Staples, 511 U.S. 600.

2 The court concludes that that case is not on all fours with this  
3 case.

4 In Staples there was an AR-15 involved which was made  
5 to fire only one bullet with each pull of the trigger.

6 Therefore, it was not a machine gun and not normally within the  
7 statutory definition of firearm under Section 5861(d).

8 The Staples weapon had been modified to fire fully  
9 automatically. And the government in Staples argued that it was  
10 a machine gun and the defendant possessed it -- and that the  
11 defendant's possession of it was enough to convict under the  
12 statute. The Supreme Court disagreed and concluded that the  
13 government should have been required to prove that the defendant  
14 knew the features of this AR-15 that brought it within the  
15 statute.

16 It was on that basis that upon remand the Tenth  
17 Circuit Court of Appeals concluded that no reasonable jury could  
18 find the defendant guilty beyond a reasonable doubt.

19 Here, of course, it is clear based upon the evidence  
20 that I've reviewed, that Mr. Olofson knew the weapon at issue  
21 here could fire automatically. That was not the case in  
22 Staples.

23 In addition, other evidence demonstrates that  
24 Mr. Olofson knew and continues to know the difference between  
25 his rifle and an automatic weapon and knew how to convert the

1 AR-15 to an M-16.

2 The information on Mr. Olofson's computer,  
3 Mr. Olofson's conversations with the agent, Mr. Olofson's  
4 statements to his customer, as well as the evidence that was  
03:26 5 clearly viewed by the jury in looking at the video the Court  
6 just had shown, satisfies the Court that a reasonable jury could  
7 conclude beyond a reasonable doubt on legal admissible evidence  
8 that this defendant is guilty as charged in the indictment in  
9 this case.

03:27 10 Mr. Olofson, despite his argument that he owned a  
11 legal albeit malfunctioning AR-15, was, on the basis of this  
12 evidence, found guilty, and the Court cannot on this record  
13 overturn that jury determination. As a consequence, the motion  
14 for judgment of acquittal is denied.

03:27 15 In light of all of those considerations the Court must  
16 now inquire of you, Mr. Olofson, whether you've had a chance to  
17 review with your counsel the presentence report which has been  
18 prepared in this case.

19 THE DEFENDANT: I have, Your Honor.

03:28 20 THE COURT: Are you satisfied that you and your  
21 counsel have had sufficient time to discuss not just the  
22 presentence report or any and all other matters you believe your  
23 attorneys should address at this hearing today?

24 THE DEFENDANT: In relation to the one we filed, in  
03:28 25 relation to the one the government filed I'm not sure if me and

1       them are clear on everything.

2               THE COURT:   If you'd like to take a short break we  
3       will do so.   Would you like to take a break?

4               THE DEFENDANT:   Yes, Your Honor.

03:28   5               THE COURT:   We will take a short recess.

6               THE BAILIFF:   All rise.

7               (Recess taken at 3:28 p.m., until 3:40 p.m.)

8               THE COURT:   Mr. Olofson, have you now had sufficient  
9       time to talk with your attorneys about any additional matters  
03:41   10       you would like them to address during the course of sentencing?

11              THE DEFENDANT:   I believe so, Your Honor.

12              MR. FAHL:   Your Honor, before we begin to sentencing  
13       if I could just get a couple clarifications about the ruling on  
14       the motion for judgment of acquittal.

03:41   15              First, there was a void for vagueness prong of that  
16       motion for judgement of acquittal that I don't believe the Court  
17       addressed in its ruling here.

18              THE COURT:   There is nothing about the statute or the  
19       way it was applied in this case suggesting it was void for  
03:41   20       vagueness, or that you should be entitled to acquittal in this  
21       case.

22              It's clear exactly what constitutes a machine gun.  
23       Your suggestion is that the statute as applied, or that the  
24       statute as written, makes it unclear what would constitute a  
03:42   25       machine gun.

1 I do not find any support for either of those  
2 arguments in either the evidence in this case, showing how the  
3 statute was applied, or in the wording of the statute.

03:42 4 MR. FAHL: Okay. I understand. I just want to make  
5 sure the record is clear.

6 And the second thing I just wanted to make sure I was  
7 clear on, is the conversion that the court was considering that  
8 the jury could find was the replacement of the four AR-15 parts  
9 with M-16 parts?

03:42 10 THE COURT: My point was that there certainly was  
11 evidence in the record concerning possible conversion. But that  
12 is not crucial. That's not necessary. What was necessary was  
13 that the evidence showed your client knew this was a weapon  
14 which could fire multiple times with a single function.

03:43 15 It was capable of such firing as well, at the very  
16 least. But the jury also could have concluded that there was a  
17 conversion because there was testimony to support such  
18 conclusion.

03:43 19 MR. FAHL: Okay, thank you. I wasn't quite clear on  
20 that. I just wanted to make sure I understood. And then we are  
21 ready to proceed to sentencing, Your Honor.

22 THE COURT: Are there any objections to the facts as  
23 set forth in the presentence report?

24 MR. HAANSTAD: None from the government, Your Honor.

03:43 25 MR. FAHL: None that have not already been submitted,

1 Your Honor.

2 THE COURT: And I believe that they have all been  
3 addressed adequately in the addendum; is that your view,  
4 Mr. Fahl?

03:44 5 MR. FAHL: Yes, that's correct, Your Honor.

6 THE COURT: And are there any clarifications that  
7 should be addressed before the Court proceeds further with  
8 respect to the facts in the presentence report?

9 MR. FAHL: No, Your Honor.

03:44 10 MR. HAANSTAD: Not from the government, Your Honor.

11 THE COURT: The Court is therefore adopting the  
12 factual statements in the amended presentence report as well as  
13 the guideline application in the absence of any objection. Is  
14 there perhaps an objection that I have not considered?

03:44 15 MR. FAHL: No, Your Honor.

16 MR. HAANSTAD: No, Your Honor.

17 THE COURT: The advisory guidelines then would place  
18 the defendant at offense level 18, criminal history category I.  
19 The advisory guideline range is from 27 to 33 months of  
03:44 20 imprisonment with at least two but not more than three years of  
21 supervised release. The fine range goes from \$6,000 to \$60,000,  
22 and the special assessment called for by the Mandatory Victims  
23 Restitution Act, Title 18, Section 3013 is \$100.

24 Unless there is exception taken the Court will  
03:44 25 therefore consider the arguments of the parties under 18 U.S.C.,



1 Section 3553. Mr. Haanstad?

2 MR. HAANSTAD: Your Honor, the government's position  
3 is set forth in the sentencing memorandum that it filed.

4 The guidelines here recommend a sentence of between 27  
03:45 5 and 33 months of imprisonment. And the government recommends a  
6 sentence at the top of that range, that is, a sentence of 33  
7 months of imprisonment.

8 The defendant is asking for a sentence of 12 months of  
9 probation. And it's difficult to quantify just how far below  
03:45 10 the guidelines their request is. 12 months obviously is less  
11 than half of the low end of the guidelines imprisonment range,  
12 and the defense asks for that entire term to be only probation.

13 In support of their request the defendant has offered  
14 two principal bases, one of which has to do with the nature and  
03:45 15 circumstances of this offense and the other of which has to do  
16 with the personal history and characteristics of the defendant.

17 With respect to the nature and circumstances of this  
18 offense, the defendant has repeatedly maintained that his  
19 converted machine gun was simply a malfunctioning semiautomatic  
03:46 20 rifle. And the analysis that the court went through with  
21 respect to the defendant's motions for acquittal and a new trial  
22 showed that that simply is not the case. There's no support for  
23 that characterization in the record, and such a characterization  
24 clearly is contrary to the unanimous jury verdict in this case.

03:46 25 So the type of offense that was committed here and the

1 facts underlying Mr. Olofson's offense are precisely the type of  
2 conduct at which Section 922(o) was aimed. And contrary to  
3 Mr. Olofson's contentions, there's nothing here that mitigates  
4 the seriousness of his offense, particularly not to the extent  
03:46 5 that a sentence below the sentencing guidelines is warranted.

6 Mr. Olofson also claims that a sentence of probation  
7 is warranted in light of certain personal history and  
8 characteristics, particularly in light of his military  
9 experience and background.

03:46 10 But, as the government explains in its sentencing  
11 memorandum, while he was in the army Olofson used his position  
12 in the army in a number of ways that are troubling.

13 He used his position to access and download sensitive  
14 restricted files, including all unit information at the end of  
03:47 15 each drill in which he was engaged with his army unit. And his  
16 activities in that regard raised concerns in the army that  
17 Olofson had distributed those materials to militia groups that  
18 Olofson himself acknowledged to other soldiers that he was  
19 connected with.

03:47 20 The army also found that Mr. Olofson may have sold or  
21 given the identities, including Social Security numbers, of as  
22 many as 91 soldiers to people outside of the military, and that  
23 Mr. Olofson may have allowed illegal access to military  
24 information by outside organizations.

03:47 25 All this history and characteristics with respect to

1 Mr. Olofson's military service, as I said earlier, raises  
2 concerns. And what begins to develop is a picture of  
3 Mr. Olofson where his military experience, his attitude towards  
4 guns and gun laws, much of which flow from his involvement with  
03:48 5 militias, and his illegal activities all are intertwined.

6 Not only was his military -- or, I'm sorry, his  
7 militia connection apparent in the army investigation that took  
8 place, but around that same time period Mr. Olofson was  
9 communicating with an individual who was apparently the leader  
03:48 10 of some sort of vigilante movement in the southern United States  
11 and offering his, Olofson's, assistance to that individual, in  
12 the course of doing so touting all of his military experience  
13 and the military experience of other people that he was  
14 connected with.

03:48 15 He also offered -- he offered not only personnel, but  
16 also armor and weaponry to this leader of the vigilante group in  
17 the southern United States.

18 Mr. Olofson also in a number of different ways evinced  
19 really a disregard for federal firearm laws as well as state  
03:49 20 firearms laws.

21 Mr. Olofson attempts to portray himself as a  
22 responsible gun owner who has always exhibited respect for gun  
23 laws. But in fact, as the court explained in the course of  
24 deciding the motion for judgment of acquittal, Mr. Olofson's  
03:49 25 actually expressed his not only disagreement, but also his

1 unwillingness to abide by federal firearms regulations. And I'm  
2 here referring to the communication that he had with the  
3 individual who was interested in the unlicensed -- or the  
4 registration of unlicensed machine guns where Mr. Olofson told  
03:49 5 him that as a sovereign he, Mr. Olofson, was unhindered by  
6 federal firearms laws and didn't have to follow those laws like  
7 ordinary United States citizens did.

8 Mr. Olofson also, again contrary to his claim of  
9 responsible gun ownership, has a couple of prior convictions for  
03:50 10 firearms related offenses, including one in which Mr. Olofson  
11 was trick-or-treating with his son and was carrying a .9  
12 millimeter pistol that was loaded with 15 rounds of ammunition  
13 and was concealed at Mr. Olofson's back.

14 So again, Your Honor, all of these things suggest that  
03:50 15 there are no mitigating circumstances with respect to  
16 Mr. Olofson's personal history and characteristics, and that in  
17 fact his personal history and characteristics, particularly with  
18 respect to firearms and firearms laws, warrant a sentence at the  
19 top of the applicable guidelines range, and it's that sentence  
03:50 20 that the government asks for, Your Honor.

21 THE COURT: Mr. Fahl?

22 MR. FAHL: To begin with, Mr. Olofson's parents would  
23 like to say something, address the Court.

24 THE COURT: Certainly. They can move forward and  
03:51 25 stand at the lectern and speak.

1 THE CLERK: Please state your name for the record.

2 MR. DAVID L. OLOFSON: My name is David L. Olofson.  
3 I'm the father of David R.

4 THE COURT: You may proceed. Thank you.

03:51 5 MR. DAVID L. OLOFSON: Your Honor, I -- forgive me if  
6 will I ramble a little bit. I'm just still trying to get my  
7 mind around this whole thing and where it's gone and how come  
8 it's gotten this far. And major reason for that is, I know the  
9 weapon. I have gone target shooting with him and I know that it  
03:51 10 has never done what was shown in this video.

11 And contrary to what I just heard, I have always  
12 preached to my son since he was eight years old when we went out  
13 hunting together, that was the one thing that we always did is  
14 we always went hunting together, and I reinforced that over and  
03:52 15 over again, he had to follow the state laws, otherwise he  
16 wouldn't go out with me.

17 Having said that, the community that he lives in knows  
18 David very well, and you would be hard pressed to find one  
19 individual that would not trust their lives with David -- or  
03:52 20 that wouldn't be afraid to trust their lives with David. His  
21 house is a congregation point for all the kids after school.  
22 And their parents are aware of that, and they do not have a  
23 problem with that. He's an assistant leader in a Boy Scout  
24 group, and he takes kids on excursions, and he voluntarily takes  
03:53 25 them out fishing, teaching them that sport and how to do it, and

1 on his own time and at his own expense. And the kids love to go  
2 with him. You know, he does not have to ask if somebody would  
3 like to go, they're asking him, when are we gonna go out next.  
4 And it's not something that happens just occasionally, this is a  
03:53 5 weekly basis that he is together with those kids and taking them  
6 and doing numerous things which we as parents are proud of, that  
7 he does take the time to spend with the kids, teaching them all  
8 of these activities.

9 He's not teaching them anything about guns, as I would  
03:54 10 be totally upset if he ever went down that path. That is not  
11 what he was brought up to do.

12 He is strong in his beliefs and that's one thing that  
13 we have preached to him and all of our kids. I have a daughter  
14 who is in the Peace Corps right now down in Paraguay serving  
03:54 15 this country. He joined the army after high school, that's what  
16 he always wanted to do, we encouraged them to do that. If  
17 that's what they believe rightfully to do, then go for it and  
18 give your time to your country. And he has. And he has given  
19 14 years to the army reserve as well.

03:54 20 In light of all that I would ask for leniency in the  
21 court's sentencing. Thank you.

22 THE COURT: Thank you, Mr. Olofson. Appreciate your  
23 remarks. Does your wife wish to move forward?

24 Please state your name and spell the last.

03:55 25 MS. PATRICIA OLOFSON: My name is Pat or Patricia

1 Olofson.

2 THE COURT: Good afternoon.

3 MS. PATRICIA OLOFSON: This is very difficult for me.

4 David was always a bright, energetic, giving person from the  
03:55 5 time he was a toddler. Like my husband said, at the age of  
6 eight he wanted to be a soldier. I thought it was a phase he  
7 was going through, but at the age of 18 he enlisted, against my  
8 will. But like my husband said, we brought up our kids to  
9 believe in something and to give from your heart. He gave to  
03:56 10 his country. He served four years. And I prayed every night  
11 that he would come home. I was afraid he would re-enlist  
12 because he was the type of person to make this a career, and as  
13 a mother I was in great fear of that.

14 But because of things that he saw and things that the  
03:56 15 government did to our own soldiers he chose to come home. And  
16 he met his wife and got married, and today he has three lovely  
17 children. He participates as a father in all kinds of  
18 activities. He's part of the community, and he shares and he  
19 gives so much of himself.

03:57 20 He did go to school after he came out of the service,  
21 and he went into the police force, but he had another calling to  
22 computer work and he donated many hours in our different  
23 communities, communities and clubs that couldn't afford to have  
24 people fix their computers. He volunteered and never asked for  
03:58 25 anything. He even bought the parts just so they could have

1 something to work with.

2 David has always given so much, and when he finds a  
3 need or if somebody can't afford something he tries to work it  
4 out.

03:58 5 And I believe who this person was that wanted to test  
6 his gun, he loaned it for the goodness of his heart. I have  
7 never ever seen my son put a gun together. He has always hunted  
8 and fished with my family. I had a brother who was a cop for 24  
9 years, and he used to go hunting with him. And my husband took  
03:59 10 him hunting from early on.

11 He has respect for our country, our history, and to do  
12 what's right even though everybody's against him. And that's  
13 his strong will. And I love him for it. It may not be the  
14 right road because it's difficult, but he chooses to make sure  
03:59 15 that the truth is known.

16 And I can't believe that something like this has  
17 exploited and exploded beyond measures. And I don't know what  
18 to say about it because he never did any of those things.

19 And I ask you to take a hard look at this because as  
04:00 20 an American citizen, a wonderful husband, and the things he's  
21 done for his community and people that respect him, this would  
22 be such a disservice. That's all I got to say.

23 THE COURT: Thank you very much.

24 Mr. Fahl?

04:00 25 MR. FAHL: Your Honor, as I listened to the



1 government's sentence argument it seems to me that they want to  
2 sentence Mr. Olofson at the high end of the guideline range  
3 because he expresses views outside the mainstream. They're  
4 concerned about this idea that maybe he thinks he's his own  
5 sovereign.

6 Mr. Olofson pays his taxes. You know, that's not  
7 somebody who believes in their own sovereign. They don't pay  
8 their taxes. They don't follow the rules. You know, he does  
9 that. Maybe he believes, you know, we should be our own  
10 sovereign or you should do this, but he doesn't elicit the  
11 behavior that matches that.

12 They talk about an e-mail to a member of the  
13 Minute-Men. Well, there's no evidence that David Olofson ever  
14 went down there, or that he sent them weapons, or anything.  
15 Maybe he's sympathetic with their cause, but all we have is an  
16 e-mail.

17 We talk about his military service. It's been long,  
18 and it's been distinguished. The government brings up an  
19 investigation into Mr. Olofson. Now, this investigation,  
20 there's no indication that Mr. Olofson was ever in fact informed  
21 of it. It's my understanding of the military code of justice  
22 that in order for an investigation or reprimand to be considered  
23 official it must be received and signed by the person being  
24 reprimanded.

25 THE COURT: I believe there is some indication in the

1 record that this information was provided to Mr. Olofson. He  
2 had a chance, he was given a chance to respond to it as well.

3 MR. FAHL: Your Honor, I didn't see -- I see that  
4 there was suggestions about what should be done on the  
5 recommendations and some annotations of what could have been  
6 done, but I can't tell who those were, or whose markings those  
7 were or whether in fact they took place.

8 Irrespective of that, Mr. Olofson could today -- he  
9 has training maneuvers starting this weekend, training. He is  
10 still a member of this reserve group. If this conduct was so  
11 egregious, why would he still be a part of the reserves? Why  
12 would he be invited back to come back and continue his service?  
13 And even during this time he received a commendation for his  
14 service in the military.

15 So while there may have been an investigation, you  
16 know, it's just that. These are allegations. There's no -- we  
17 don't have the facts. We have a letter of an investigation of  
18 reprimand, we don't have the facts as to what was finalized,  
19 what were the packets that were presented to Mr. Olofson, and  
20 what were the official findings.

21 And like I said, in my understanding of the code of  
22 military justice there has to be some acknowledgement as signed  
23 by Mr. Olofson. I don't see that here, and to my knowledge it  
24 doesn't exist.

25 THE COURT: Now, are you looking at the letter --

1 MR. FAHL: Exhibit A of the government's sentencing  
2 memorandum.

3 THE COURT: Yes. Exhibit A says in paragraph 4:

4 I intend to place this memorandum in the performance  
04:04 5 fiche portion of your official military personnel file. I'm  
6 referring this memorandum to you for comment because it contains  
7 derogatory information. You will reply by memorandum, sample  
8 enclosed, to me no later than 10 days from receipt of this  
9 letter. You may include comments and information regarding  
04:04 10 matters in extenuation or mitigation. I will consider any  
11 timely submissions before deciding whether to make this letter  
12 of reprimand final and the appropriate location for filing.

13 Does that in your view suggest your client was not  
14 given an opportunity to be heard with regard to the comments  
04:05 15 that were made respecting his downloading of information and  
16 misuse of his position as a member of the military -- of a  
17 military unit?

18 MR. FAHL: Yes, Your Honor. He never received a copy  
19 of this memorandum. When I presented this to him today, it was  
04:05 20 a shock to him that he was under any sort of reprimand or  
21 investigation considering -- especially considering the fact  
22 that he received a commendation and award during this time  
23 period.

24 THE COURT: Now, I note that there is behind that  
04:05 25 particular exhibit, Exhibit A, which is dated 14 September 2002,

1 a second document dated November 9th, 2002, and it indicates  
2 that a copy was sent to SPC Olofson.

3 MR. FAHL: I can see at paragraph 1 where it says it  
4 was not accepted. But we don't know where it was sent to, if it  
04:06 5 was, you know, if it was attempted to be handed to Mr. Olofson.  
6 Mr. Olofson said he never received a copy of the letter.

7 THE COURT: But the document does indicate that  
8 Mr. Olofson was sent not only the Exhibit A, but the second  
9 memorandum, because the second memorandum says:

04:06 10 I fully considered the facts concerning my enclosed  
11 memorandum of reprimand. I also considered the soldier's lack  
12 of acceptance of my memorandum. Paren, delivery attempted on 18  
13 and 23 September and 03 October 2002. See enclosure.

14 MR. FAHL: Right. And my reading of that, Your Honor,  
04:07 15 is that delivery was never completed. And that's my  
16 understanding. And I don't know if this was attempted to be  
17 given to him at a home address, at the base or the training  
18 ground. I mean, what I can represent to the Court is that  
19 Mr. Olofson never received the letter.

04:07 20 THE COURT: All right. Then that would suggest as you  
21 indicate, that Mr. Olofson may not have personally received the  
22 information, albeit -- I should say notwithstanding the  
23 information was apparently sent to him, or delivery was  
24 attempted on the 18th and 23rd of September as well as on the  
04:08 25 3rd of October 2002.

1 Go ahead.

2 MR. FAHL: Going back to -- he's been in the military,  
3 either the active military or the reserves but for a short time  
4 for almost 20 years, Your Honor. Somebody who is more  
04:08 5 interested in paramilitary or extreme groups doesn't do that.  
6 You heard his mom. All he wanted to be from the time he was  
7 eight years old was a soldier. You know. This is what he likes  
8 to do. This is what he wants to be. This is a vocation.

9 And even assuming we take this reprimand at face  
04:08 10 value, the army still wants him. You know, if the judgment of  
11 acquittal had been entered today Mr. Olofson would be right back  
12 with the reserves training and waiting for potentially to be  
13 called up to active service. You know, his military service is  
14 a factor that mitigates against a guideline sentence in this  
04:09 15 case.

16 Talking about Mr. Olofson's gun ownership and his  
17 beliefs. Yeah, he has a rigid belief in the second amendment.  
18 He believes that the second amendment should be more expansive.  
19 But, again, he follows the rules. Talking about his prior  
04:09 20 crimes, Wisconsin does not have an open carry prohibition. It  
21 doesn't. In Wisconsin --

22 THE COURT: Well, the facts in the presentence report  
23 which have not been objected to indicate that Mr. Olofson was  
24 not carrying the pistol in the small of his back in an open and  
04:09 25 notorious fashion, it was concealed. He was charged with and

1 convicted of carrying a concealed weapon. Now, there was with  
2 respect to the first matter I believe open carry.

3 MR. FAHL: And with the second matter it was  
4 conviction of disorderly conduct. The first one was a charge  
04:10 5 for carrying a concealed weapon was dismissed based on the fine,  
6 the second one was disorderly --

7 THE COURT: Disorderly for carrying the weapon while a  
8 lot of kids were trick-or-treating on Halloween.

9 MR. FAHL: And I'm not here to argue to you the  
04:10 10 soundness of that decision. What I'm telling you is that what  
11 he did does not violate the firearms laws. Maybe he violated  
12 it -- maybe he -- adequately and was probably charged with  
13 disorderly conduct. But what I'm talking about as gun  
14 ownership, this is a person who follows the rules.

04:10 15 THE COURT: Well, that was not following the rules,  
16 Mr. Fahl. He pled guilty to having failed to follow the rules.

17 MR. FAHL: He pled guilty in a plea bargain to  
18 disorderly conduct.

19 THE COURT: But he pled to having failed to follow the  
04:11 20 rules. He can't have it both ways. He may not have been found  
21 guilty of the original charge of carrying a concealed weapon,  
22 but the facts support a finding that he was in fact carrying a  
23 weapon which was concealed. Although the finding, the judgment  
24 of conviction was for disorderly, the facts underlying the  
04:11 25 disorderly conviction show that he was carrying a weapon on

1 Halloween with kids who were trick-or-treating.

2 MR. FAHL: Your Honor, again, you're talking about  
3 facts --

4 THE COURT: I can't conclude anything else in large  
04:11 5 measure because the facts in the presentence report have not  
6 been objected to and the Court accepted those facts as true.

7 MR. FAHL: Right. And the facts are what they are. I  
8 mean, you can't argue with what the facts -- that was what they  
9 were charged with. There was no litigation, there was no  
04:12 10 factual finding on that now -- on that at the time. And you  
11 can't go back.

12 I mean, I think the fact that it was pled down to  
13 disorderly conduct indicates the lack of egregious nature. The  
14 fact that he can carry it on his belt, and if it's on the side,  
04:12 15 as long as it's not --

16 THE COURT: It was in the small of his back according  
17 to the facts in the presentence report.

18 MR. FAHL: But as long as he's not carrying it behind  
19 a jacket that's still open, Your Honor. Under the -- again,  
04:12 20 this is perhaps --

21 The point I was trying to make with this is that if  
22 there's a rule regarding the firearms, he's going to follow it.  
23 He may toe it right up to that line, but he's going to follow  
24 it. And it was his belief and I believe it's correct that you  
04:12 25 can open carry a gun in Wisconsin. And it can be on your back,

1 on the side or the front, and that's what he was doing.

2 Now, is that the smartest thing to do on the night of  
3 trick-or-treating? No. But again, the point is about his  
4 respect for the laws regarding firearms.

04:13 5 THE COURT: The argument that I was hearing was that  
6 Mr. Olofson always follows the rules, and that is what I was  
7 responding to. The facts which this court must accept and has  
8 indeed accepted show that he does not always follow the rules,  
9 particularly with respect to his conduct on Halloween with the  
04:13 10 kids.

11 MR. FAHL: You know, and I understand what Your Honor  
12 is saying, I'm just trying to point out that, you know, it's my  
13 belief that based on this his conduct was perfectly legal as far  
14 as carrying the concealed firearm. Whether or not it would  
04:13 15 constitute disorderly conduct is a separate thing that I was not  
16 trying to take umbrage with.

17 Getting back to Mr. Olofson. Again, I think his  
18 military service is distinguished as a mitigating factor. I  
19 think --

04:14 20 THE COURT: But that same service would suggest that  
21 Mr. Olofson was and continues to be familiar, very familiar with  
22 firearms.

23 MR. FAHL: Yes, Your Honor.

24 THE COURT: And he wasn't just some novice who  
04:14 25 happened to loan a firearm to someone who was interested in



1 going to a gun range. You're talking about a military man.

2 MR. FAHL: Right.

3 THE COURT: With considerable military experience.

4 MR. FAHL: And we're talking about a weapon which is  
04:14 5 essentially a military weapon but is the semiautomatic legal  
6 version of that.

7 THE COURT: But what you're arguing also goes the  
8 other way because it shows knowledge. Perhaps more knowledge  
9 than the average person who has not been in the military.

10 MR. FAHL: Right. And I guess, you know, and it's  
04:14 11 still the contention that he has knowledge of what is and what  
12 is not a machine gun, and using that knowledge he did not  
13 believe that what he had was a machine gun.

14 THE COURT: But according to his own statements he  
04:15 15 knew it was a machine gun, Mr. Fahl. And again, that's part of  
16 the record. I don't have anything in the record to the  
17 contrary.

18 MR. FAHL: Again -- and, Your Honor, the statements  
19 that you're relying on, again, Mr. Kiernicki, who, you know,  
04:15 20 some of that was recanted on cross-examination, and in the  
21 interview with Agent Keeku. And it's true that there was only a  
22 certain amount of evidence that came in during the trial. But  
23 at one point, and this is --

24 THE COURT: Well, let me stop you there. Where in the  
04:15 25 record is there evidence that the witness recanted his statement

1 concerning the exchanges, the various exchanges he had with  
2 Mr. Olofson respecting the weapon at issue?

3 MR. FAHL: My recollection of the testimony,  
4 Your Honor, was that after cross-examination he couldn't be sure  
04:16 5 of exactly what Mr. -- you know, I think the lynchpin was  
6 whether or not Mr. Olofson said this is a -- don't use this  
7 third setting because it fires automatically.

8 Mr. Mullins cross-examined and asked questions  
9 concerning isn't what he said that don't use the third setting  
04:16 10 because it jams, and to which point I think there was an  
11 answer -- well, I don't know, or -- and that's -- you know,  
12 that's my recollection of the cross-examination.

13 THE COURT: Well, let's go back and touch on that.  
14 Mr. Mullins asked Mr. Keeku -- I'm sorry, Mr. Kiernicki, I  
04:17 15 believe this is on page 53:

16 And did you not state in that statement that  
17 Mr. Olofson expressed surprise to you that you got in trouble  
18 because he had fired the gun automatically at the Conservation  
19 Club before, correct?

04:17 20 Answer: Correct.

21 And later on at line 21:

22 Question: Is it possible that Mr. Olofson just said  
23 to you, gee, I fired that gun at the range before and never had  
24 any problems? Is it possible that he just said that?

04:17 25 Answer: No.

1           Also, during cross-examination I do not recall -- it  
2 starts at page 41. Page 44. Cross-examination by Mr. Mullins,  
3 there was the following exchange.

4           Line 5: Okay. And then you fired it. It was a  
04:19 5 semiautomatic gun, it didn't fire automatically the first time  
6 that you had it. Correct?

7           Answer: Yeah.

8           Question: And you had fired it at the gun club -- I'm  
9 sorry, at the Conservation Club.

04:19 10          Answer: Yeah.

11          And do you remember when this was?

12          Answer: I don't remember, I don't know.

13          Question: Okay. So the second time you borrowed it  
14 you returned it to Mr. Olofson after a couple weeks, correct?

04:19 15          Nods head.

16          Question: And then a couple weeks later you came back  
17 and borrowed it again, correct?

18          Answer: Yeah.

19          Question: And again, you never said, hey, this is  
04:19 20 going to fire automatic if you put it in this third position,  
21 correct?

22          No response.

23          Question: That time that you went over there, when  
24 you went to his house --

04:20 25          Answer: He never mentioned anything about it until

1 the fourth time.

2 Question: Well, I didn't ask you that. The second  
3 time, the second time he never said it fires automatically.

4 Answer: True.

04:20 5 Question: Okay. And you fired it. And again it did  
6 not fire automatically.

7 Answer: Yeah.

8 And then you came back a third time and again  
9 Mr. Olofson never said, hey, this thing fires as a machine gun  
04:20 10 or automatically.

11 Answer, it says nods head.

12 Question: And you use it again and again and it  
13 didn't fire automatically, correct?

14 Answer: Yeah.

04:20 15 Okay. And you weren't looking for an automatic gun.

16 Answer: No.

17 Question: That wasn't why you went to Mr. Olofson to  
18 get a gun.

19 Nods head.

04:20 20 Question: Okay. Now, the fourth time. You testified  
21 that Mr. Olofson said you noticed it had this third selector  
22 switch, correct?

23 Answer: Yeah.

24 Question: And you brought it up to Mr. Olofson, hey,  
04:20 25 what happens when you put it in this position, correct?

1 Answer: I don't know.

2 Question: You don't remember what you said --

3 Correction.

4 Question: You don't remember what you asked him?

04:21 5 Answer: Yeah, I don't remember.

6 Question: Okay. So now, you testified that

7 Mr. Olofson told you that it fired in three-round bursts.

8 That's how you testified.

9 Answer: Yeah.

04:21 10 However, do you recall speaking to police back in July  
11 13th, 2006, you spoke to a Berlin police officer named Officer  
12 Zache; do you remember that?

13 Answer: Yeah.

14 And you told him that Mr. Olofson said the three-round  
04:21 15 burst does not work because it was missing some type of thing.  
16 That's what you told Officer Zache?

17 Answer: Yes.

18 So Mr. Olofson essentially just told you, you asked  
19 Mr. Olofson what happens if I put it into this third position,  
04:21 20 he said, well, it doesn't work because it will malfunction if  
21 you do that, correct?

22 Answer: It would malfunction and jam, okay.

23 But you decided to do it anyway. You decided to put  
24 it in that third position anyway even though Mr. Olofson told  
04:22 25 you not to because it would malfunction.

1 Answer: Yeah.

2 Question: Correct.

3 Answer: Nods head.

4 Okay. And it fired three rounds. And you did that  
04:22 5 about two, three times.

6 Answer: At least twice and then it jammed.

7 And there was more ammunition in the gun but it wasn't  
8 firing because the gun was jamming, correct?

9 Answer: Yeah.

04:22 10 And it wasn't that you were taking your finger off the  
11 trigger, it just jammed while your finger was on the trigger.

12 Uh-huh.

13 Question: Okay.

14 Is that a yes or a no from the court?

04:22 15 The witness: Yes.

16 Is that what you're referring to as the recantation?

17 MR. FAHL: Yes.

18 THE COURT: All right. Go ahead.

19 MR. FAHL: Going back to the nature of Mr. Olofson in  
04:23 20 the 3553 factors. The other factor that the court should  
21 consider is his role in his family, as the stay-at-home father,  
22 the primary child care while his wife works, and as you heard  
23 his role as a Cub Scout leader and his activities in the  
24 community which make him a vital part of that community.

04:23 25 When we turn to the nature of the offense, you know,

1 our consideration of what this offense actually is, it's fully  
2 discussed in the briefs and I'm not going to enter into a  
3 discussion of that here.

4 But I will say when you compare this offense to the  
04:23 5 other types of offenses that are covered by the statute, people  
6 buying, possessing an actual, you know, machine gun, one that  
7 was designed and created by the manufacturer to function this  
8 way, or people who are running guns or using these for elicited  
9 purposes, they are subject to the same guideline structure that  
04:24 10 Mr. Olofson is. His conduct is significantly less egregious  
11 than that.

12 We have a gun that, you know, we believe malfunctioned  
13 in firing multiple rounds. It's a gun that did not have an auto  
14 sear, a drop-in auto sear or a lightening link. Didn't have any  
04:24 15 of these major conversions that can be done to a weapon to make  
16 it fire automatically. This was an AR-15 that has a slip in the  
17 selector switch which allowed it to go to the third position  
18 which then only 66 percent of the time would cause multiple  
19 firings.

04:24 20 THE COURT: 66 percent of the times is not a figure  
21 that's based on the record in this case, is it? It may have  
22 happened on several occasions according to the testimony, but  
23 with regard to the overall use of this weapon there's nothing to  
24 show that 66 percent of the times this weapon is used it jams if  
04:25 25 it's put into the automatic mode. Correct?

1 MR. FAHL: You could say the one other time was,  
2 Kiernicki would make it three out of four times.

3 THE COURT: Well, those are occasions that it jammed,  
4 but that's not a showing that whenever this weapon is operated  
04:25 5 66 percent of the times it jams.

6 MR. FAHL: We can say in 60 percent of the tests  
7 performed by the ATF.

8 THE COURT: That would be a more accurate statement  
9 perhaps.

04:25 10 MR. FAHL: And in those times you would use the soft  
11 primered ammunition. And what I'm trying to say there is that,  
12 again, this isn't a gun that will even in ATF's own tests would  
13 fire automatically every single time and it was clearly designed  
14 that way. This is a different sort of animal.

04:26 15 Regardless of what sort of culpability we assess to  
16 Mr. Olofson on whether or not he converted this, whether this is  
17 an accident, the hammer follow, it looks like, and the evidence  
18 seems to show, that in ATF tests you need to put in the soft  
19 primered ammunition for it to work like this. This is a  
04:26 20 different sort of machine gun than the average machine gun that  
21 finds itself under 922(o) convictions.

22 THE COURT: I have no idea what the average machine  
23 gun is like. There's nothing in the record or that I have had  
24 offered in connection with sentencing that shows what the  
04:26 25 average machine gun does or does not do when it has soft



1 primered ammunition or, I should say commercially available  
2 ammunition according to the testimony of the officer in the  
3 video. Commercial ammunition as opposed to military ammunition.

04:27 4 MR. FAHL: Well, a machine gun has an auto sear and I  
5 think the evidence -- a gun, a weapon that is manufactured to be  
6 a machine gun has an auto sear. This gun did not have it.

7 THE COURT: But the point of the statute is the  
8 functioning of the weapon, not the parts that cause a particular  
9 function. The statute talks about the function, it doesn't talk  
04:27 10 about the parts.

11 MR. FAHL: No, it doesn't, Your Honor. But, again, we  
12 may differ on our interpretation of how Staples applies. I  
13 think when Staples drafted the knowledge requirement on there,  
14 the intent was to make sure that the person or persons being  
04:27 15 charged with these crimes, possessing a machine gun, were  
16 possessing an actual machine gun, something they knew to be a  
17 machine gun.

18 THE COURT: And your client stated that he knew that  
19 it was a machine gun. He told his customer that it was a  
04:28 20 machine gun, and he also indicated to the ATF agent, BATF agent  
21 that he knew what a machine gun is. And according to the  
22 e-mails, he also was counseling people with respect to what  
23 constitutes a machine gun.

24 MR. FAHL: Correct. We don't deny that Mr. Olofson  
04:28 25 had the knowledge of what is a machine gun. The question is

1 this was not that kind of machine gun. A machine gun, according  
2 to his knowledge, and this is --

3 THE COURT: Let's confine it to the knowledge  
4 demonstrated in the record.

04:28 5 MR. FAHL: Which is buttressed by the AR-15/M-16  
6 conversion book, indicates there are three ways to convert an  
7 AR-15 into an M-16. There's the conversion, the drop-in auto  
8 sear, and the lightning light. The latter two weren't involved  
9 here.

04:29 10 The first one, to convert it, not only do you have to  
11 replace those parts on pages 10 and 11, but you also have to do  
12 a detailed machining. Now, even if Mr. Olofson knew how to do  
13 this, there's no evidence that he had any of the equipment or  
14 the ability to actually make those machine parts. And it must,  
04:29 15 according to this conversion book, it must involve putting in a  
16 permanent auto sear. That wasn't present here.

17 So, what I'm getting at, Your Honor, is that this is a  
18 different type of gun. This is not -- the M-16. This is not  
19 one of these other military designed weapons that somebody has  
04:30 20 when they shouldn't.

21 We have a legal AR-15 that had a problem. And  
22 whether -- I'm saying regardless whether you attribute that  
23 problem to Mr. Olofson or to an accident, it's still different  
24 than these larger military grade weapons where you have to go  
04:30 25 out of your way to purchase this illicit weapon. This is

1 something --

2 THE COURT: This is not just a weapon that had a  
3 problem, this is a weapon that fired automatically.

4 MR. FAHL: Right, due to --

04:30 5 THE COURT: In fact, the neighbors of the Conservation  
6 Club called in to say it was firing automatically.

7 MR. FAHL: Right. Never did Mr. Olofson deny that --  
8 we saw the video. It must have fired automatically.

9 But again, just because something does that once it  
04:30 10 does not make the machine gun make. It is a machine gun or it  
11 isn't. And we're getting back to the motion.

12 THE COURT: But it does have significance as far as  
13 where the Court should sentence your client, so I'm certainly  
14 appreciative of your argument. And so I'm not trying to dismiss  
04:31 15 your argument at this point. I just want you to know that. I  
16 do appreciate what you're saying. And it is significant that  
17 you're pointing out that there were occasions when the weapon  
18 malfunctioned, in your client's view and the view of Mr. Savage.  
19 And, of course, the customer testified that the weapon  
04:31 20 malfunctioned, but it malfunctioned with the knowledge of the  
21 defendant that it would fire automatically with one function of  
22 the trigger, one pull of the trigger, and he loaned it to this  
23 customer knowing it operated in that fashion or had the ability  
24 to operate in that fashion.

04:32 25 MR. FAHL: And, Your Honor, although this was not --

1 this was not evidence that was in trial, and, you know, perhaps  
2 I should have added this to the facts to be considered as part  
3 of the presentence report, but there was, in his statement to  
4 Agent Keeku, he did say he didn't believe that this was an  
04:32 5 automatic rifle. And he also, you know, said maybe it can --  
6 sometimes the parts can wear down and fire fully automatic, but  
7 then you have to fix them, you have to replace those parts.

8 THE COURT: But there was testimony that the parts  
9 were not worn. When the gun was examined, the testimony was  
04:32 10 that the parts were not worn so as to cause it to malfunction as  
11 you suggest.

12 MR. FAHL: I was just saying, in Mr. Olofson's  
13 statement to Agent Keeku, he did say that this was not a machine  
14 gun and it did not, it was not fully automatic.

04:33 15 Which again, goes to -- all I'm trying to indicate  
16 here is that this is not somebody who went and purchased what is  
17 already an illicit firearm, went out of his way to go through  
18 back channels to find something. This is, this was an AR-15  
19 that fired automatically.

04:33 20 Now, as far as the deterrent effect, the conviction  
21 itself will deter Mr. Olofson from any similar conduct because  
22 from this point forward Mr. Olofson will not be able to possess  
23 a firearm. And so I think just by conviction the deterrence  
24 factor of 3553 is met as it relates to Mr. Olofson.

04:33 25 As it relates to others, I'm not quite sure what that

1     deterrent effect is. The prevailing understanding is that when  
2     an AR-15 has M-16 parts, an auto sear is required before the ATF  
3     will consider that a machine gun. That's ATF ruling 81-4.

4             The reason why people are concerned about this case  
04:34 5     and why this case has received the press that it has, is because  
6     it now looks like that it's just simply replacing some AR-15  
7     parts with some M-16 parts that can create a machine gun, or it  
8     can be any gun that misfires causing multiple rounds to fire and  
9     you again have a machine gun. That is the concern that's out  
04:34 10    there.

11            And so what deterrent effect this is going to have on  
12    the general public, I don't know, maybe it over-deters. And  
13    that's something maybe the Court should consider when fashioning  
14    a sentence here, is that what kind of an effect the sentence  
04:34 15    will have on the greater population, especially those that are  
16    gun owners.

17            As it relates to protection of the public, again, if  
18    the concern is Mr. Olofson's use of firearms, that's met by the  
19    conviction alone. If he doesn't have the firearms then we don't  
04:35 20    have this problem again, even arguably. So, that factor is met  
21    simply by conviction.

22            And there's also a matter of uniformity. And although  
23    I don't know much about many of the cases involving convictions  
24    of 922(o), I am aware of one case from the Southern District of  
04:35 25    Illinois which is United States vs. Harold Griffiths. In that

1 case --

2 THE COURT: What's the citation?

3 MR. FAHL: Well, this is Criminal Case Number 0630013.

4 This is from the Southern District of Illinois. We have an  
04:36 5 indictment that was filed on January 19th, 2006, charging  
6 Mr. Griffiths with knowing possessing a machine gun, Colt brand  
7 model AR-15, .223 caliber rifle.

8 In that case I received a call from Mr. Griffiths'  
9 attorney this morning who informed me that his client received  
04:36 10 pretrial diversion in that case, and he wanted me -- to let me  
11 know that before we came into the sentencing today.

12 And so there's a great disparity. I can't tell you  
13 much more about Mr. Griffiths' case than that, and because I  
14 received this information by voice mail. But somebody charged  
04:36 15 with the possession of a machine gun and which appears to be  
16 similar to Mr. Olofson's received pretrial diversion. And so to  
17 sentence Mr. Olofson to 33 months while somebody else is getting  
18 pretrial diversion, that creates a great disparity.

19 And I understand that we don't know the particular  
04:37 20 facts in this other case. But, you know, we have to -- if the  
21 government wants to sentence him to 33 months, the high end of  
22 the guideline range, which is a significant departure from this  
23 pretrial diversion, we should make sure that the sentence  
24 Mr. Olofson receives is somewhat uniform and somewhat relatable  
04:37 25 to other cases like this, especially considering Mr. Olofson's

1 personal circumstances and the nature of the offense.

2 In the end I want to repeat, it appears that the  
3 government was more concerned about Mr. Olofson's personal  
4 beliefs when looking to sentence him to 33 months, than they  
04:38 5 were about the actual conduct involved in this particular case.  
6 The conduct here is not that egregious.

7 And for that reason I think considering his military  
8 service, his family history, his involvement in the community,  
9 that Mr. Olofson should be sentenced to a term of 12 months  
04:38 10 probation, which would be the lowest possible sentence this  
11 court could impose.

12 Now, noting that post all, probation is considered  
13 punishment. And I should also note that Mr. Olofson has been on  
14 supervision for 18 months, almost going on 18 months now since  
04:38 15 his indictment and initial appearance in this case. So he's  
16 been under these harsher conditions for 18 months up to this  
17 point.

18 So if this court were to impose a term of probation of  
19 a year, you know, you could almost add another 18 months to what  
04:39 20 Mr. Olofson has already been subject to.

21 And that's all we have, Your Honor.

22 THE COURT: Mr. Olofson, do you wish to make a  
23 statement at this time?

24 THE DEFENDANT: No, Your Honor.

04:39 25 MR. HAANSTAD: Judge, if I could just respond to a

1 couple things before sentencing.

2 THE COURT: Sure, go ahead.

3 MR. HAANSTAD: Again, just briefly on a couple of the  
4 points that defense counsel raised.

04:39 5 First with respect to this army investigation.

6 There's a suggestion that Mr. Olofson was not aware of the  
7 investigation, and more specifically wasn't aware of the  
8 existence of what's been attached as Government's Exhibit A to  
9 its sentencing memorandum.

04:39 10 That particular document or set of documents actually  
11 came to ATF's attention because they found a scanned version of  
12 that document on one of Mr. Olofson's computers when it was  
13 seized in the summer of 2006. So there's indications in the  
14 report itself that Mr. Olofson had knowledge of its existence,  
04:40 15 or at least the existence of the investigation. For example --

16 THE COURT: One second. Let me interrupt you. I'd  
17 like to turn back to Mr. Fahl to ask whether or not you wish to  
18 challenge that.

19 (Pause.)

04:40 20 MR. FAHL: We still challenge -- Mr. Olofson has no  
21 recollection of ever receiving that document. We don't know how  
22 it got on his computer if it was there.

23 THE COURT: So you're saying that you have no, you're  
24 not challenging the fact that the document was found on the hard  
04:40 25 drive of your client's computer?



1 MR. FAHL: Your Honor, we don't have any information  
2 as to whether that could be or not. Mr. Olofson couldn't know  
3 how it would be there if it was there.

4 THE COURT: Was this material made available to the  
5 defense as part of discovery in this case?  
04:41

6 MR. HAANSTAD: Yes, Your Honor. The government had  
7 either four or five hard drives imaged and had those available  
8 for discovery at the offices of the ATF, and also had printed  
9 off copies of different materials including the manual, the  
10 AR-15 to M-16 conversion manual, including this document,  
04:41 11 including several others that were in paper format at ATF and  
12 available for copying and inspecting.

13 THE COURT: Mr. Fahl, do you wish to reply?

14 MR. FAHL: This is the first time in Mr. --  
04:41 15 Mr. Haanstad's sentencing memorandum is the first time that I  
16 have seen the army documents.

17 THE COURT: So, but you're not challenging the fact  
18 that the hard drive material was part of the discovery in this  
19 case available for your review and consideration with respect to  
04:42 20 this case.

21 MR. FAHL: It's my understanding the hard drive  
22 material was made available to us at ATF. I believe that's  
23 true.

24 THE COURT: All right. Go ahead, Mr. Haanstad.

04:42 25 MR. HAANSTAD: Your Honor, there are also indications

1 throughout this report that Mr. Olofson was aware of the  
2 existence of the investigation. That is, the army found that he  
3 actually was not responding to phone calls and was not reporting  
4 as he was required to do for duty, and they considered him  
5 absent without leave.

6 Their conclusion was that he was -- that was part of  
7 his trying to cover up the fact that he engaged in misconduct.  
8 That, considered along with the fact that he had deleted some  
9 files and destroyed some documents that were subject to the  
10 investigation.

11 As to the issue of whether the customer who testified  
12 recanted his testimony. I think that what is a fair reading or  
13 at least a permissible reading for the jury based on all of this  
14 testimony is that Mr. Olofson communicated to the customer that  
15 the gun when placed -- when the selector was placed in the  
16 unmarked third position would fire automatically, but that it  
17 also may jam after doing so.

18 And, in fact, that's exactly what happened when  
19 Mr. Kiernicki fired the converted machine gun. He fired I  
20 believe the testimony was 100 rounds or more in semiautomatic  
21 mode. And it's not as though the gun just malfunctioned and  
22 fired automatically after firing 100 rounds semiautomatic.  
23 Mr. Kiernicki had to actually move the selector switch into the  
24 fully automatic mode, and when he did the gun immediately fired  
25 automatically.

1           So I don't think there's really any recant, that's  
2 just consistent with the information that Mr. Olofson  
3 communicated to Mr. Kiernicki, is consistent with what happened  
4 when Mr. Kiernicki actually fired the gun. And it's also  
04:44 5 consistent with the fact that when Officer Kingery performed his  
6 test fires, he didn't first test fire 100 rounds or so in the  
7 semiautomatic mode. On one occasion he test fired one, I think  
8 one or two rounds in semiautomatic mode, and because he did that  
9 the gun didn't have the opportunity to heat up like it did when  
04:44 10 Mr. Kiernicki fired, again, as many as 100 rounds in  
11 semiautomatic mode. So there was no malfunction when  
12 Mr. Kingery conducted his test fire.

13           Also, Your Honor, with respect to the test fires, on a  
14 couple of occasions defense counsel has referred to the  
04:44 15 ammunition that was used in the test fires as special soft  
16 primary ammunition. That ammunition was actually commercially  
17 available civilian grade ammunition.

18           THE COURT: That's what I found.

19           MR. HAANSTAD: I'm sorry?

04:44 20           THE COURT: That's what I found earlier. And that's  
21 what was stated on the video.

22           MR. HAANSTAD: Correct.

23           THE COURT: You don't have to clarify that point.

24           MR. HAANSTAD: As for this notion this is somehow a  
04:45 25 mitigated offense because of the construction of this particular

1 converted machine gun, or because Mr. Olofson was not alleged to  
2 have been running guns or selling or transferring a large number  
3 of guns and wasn't alleged or found to have transferred machine  
4 guns for, as Mr. Fahl puts it, elicit purposes, 922(o), along  
04:45 5 with Section 924(a)(2), provide for a maximum 10-year term of  
6 imprisonment.

7 And what we're really talking about here is trying to  
8 determine where within the range of zero to 10 years Mr. Olofson  
9 should fall. The sentencing guidelines suggests that a sentence  
04:45 10 of between 27 and 33 months is appropriate for a non-aggravated  
11 violation of Section 922(o).

12 If Mr. Olofson had been found to have been  
13 transferring large numbers of machine guns, or was found to have  
14 been transferring machine guns so that they could be used in  
04:46 15 further criminal endeavors, guidelines enhancements would have  
16 been applicable. And under consideration of the 3553(a) factors  
17 that relate to the nature and circumstances of the offense,  
18 under those circumstances a sentence of more than 33 months  
19 would have been appropriate. But the absence of those factors  
04:46 20 doesn't further mitigate this offense. Again, the 27- to  
21 33-month range is what the guidelines commission has deemed  
22 appropriate for a non-aggravated violation of Section 922(o),  
23 and that's exactly what we have here.

24 THE COURT: Ordinarily the defense gets the last word  
04:46 25 at sentencing, and so, Mr. Fahl, if you'd like to respond to

1 anything that Mr. Haanstad said I will give you an opportunity  
2 to do so.

3 MR. FAHL: Nothing, Your Honor.

4 MR. HAANSTAD: Judge, I'm sorry, but there actually  
04:47 5 was one more thing I was going to get to and I will freely give  
6 Mr. Fahl a chance to respond.

7 THE COURT: This will be the last word.

8 MR. HAANSTAD: Yes, Your Honor. I just want to  
9 respond briefly to this notion that the government's recommended  
04:47 10 sentence is somehow punishment for Mr. Olofson's having  
11 expressed views that are outside the mainstream.

12 Mr. Olofson and other citizens are free to express  
13 views they like with respect to things like sovereignty, and  
14 they are free to express and hold beliefs in which they are  
04:47 15 sympathetic to certain causes. They are free to disagree on  
16 federal firearms laws.

17 What individuals are not free to do, however, is to  
18 act in a way that is in accordance with those beliefs such that  
19 they're violating, for example, the federal firearms laws. And  
04:47 20 that's what the concern is here. Mr. Olofson has expressed not  
21 only his disagreement with federal firearms laws, but then has  
22 acted consistently with those beliefs.

23 And that's the type of concern that the court should  
24 bear in mind when determining whether the sentence it imposes is  
04:48 25 going to have a significant or sufficient deterrent effect and

1 whether it's going to is sufficiently protect the public.

2 THE COURT: The Court has reviewed the evidence in  
3 this case and has recounted some of the significant aspects of  
4 the evidence during the course of this proceeding. It has  
04:48 5 certainly given very serious consideration to the arguments of  
6 both sides. It is, therefore, the Court's view that a guideline  
7 sentence is warranted in this case, in part, because this is not  
8 an aggravated case, but it's also not a case where Mr. Olofson  
9 was proceeding naively.

04:49 10 This is a man who has considerable knowledge of  
11 weapons, considerable knowledge of machine guns, and touted that  
12 knowledge. The evidence shows that Mr. Olofson was incredibly  
13 familiar with the weapon at issue in this case and counseled his  
14 customer respecting its use.

04:50 15 The fact that Mr. Olofson gave to this customer 100  
16 rounds of ammunition on three occasions suggests to me that he  
17 knew this guy was likely to go out and fire this weapon  
18 automatically.

04:50 19 Quite frankly, the suggestion to me is that this was  
20 not the first time this weapon was used in automatic mode. That  
21 is, the 13th of July of 2006. But when you add to this the fact  
22 that 500 rounds of ammunition were loaned to this man by a  
23 person who claims he was only earning \$188 a month, who had a  
24 cash flow of only about \$40-plus a month, it just doesn't seem  
04:51 25 to fit.

1           Mr. Olofson has, in this court's view, shown that he  
2 was ignoring the law, and that he was doing so, in part, for  
3 financial gain. So there is no reason for this court to look --  
4 to accept the defendant's argument that he is deserving of a  
04:51 5 sentence below the sentencing guidelines.

6           The defendant argued that his character warrants a  
7 sentence below the sentencing guidelines. The arguments that  
8 were offered by the government were considered by the Court as  
9 responsive to the defendant's statements regarding his  
04:52 10 character; the defendant's contention that he is and has always  
11 been a loyal soldier, a person who has been in the proper  
12 service and true service of his country at all times. However,  
13 as the exhibit, Exhibit A, suggests, that hasn't necessarily  
14 been borne out by the facts as presented in Exhibit A.

04:53 15           That Mr. Olofson would go trick-or-treating with kids  
16 while carrying 15 rounds of ammunition on Halloween also  
17 undercuts his claims regarding his character. You don't put  
18 kids at risk on occasions such as Halloween and then deserve the  
19 label of good citizen who always follows the law.

04:54 20           Mr. Olofson, in his e-mail communications, also  
21 demonstrates disrespect for the law. Hence, this court cannot  
22 conclude that the law should be bent and interpreted in a way  
23 that rewards him as opposed to punishes him -- as opposed to  
24 punishing him I should say.

04:54 25           That one particular defendant in the Southern District

1 of Illinois may have been diverted is certainly something that  
2 is worthy of note, but that doesn't suggest that the heartland  
3 of sentencing -- of sentences for this offense is diversion.  
4 The heartland is essentially where the guidelines place  
04:55 5 Mr. Olofson.

6 I have to hasten to add, these guidelines are no  
7 longer mandatory. Personally I'm glad they're not, because it  
8 allows the Court to tailor sentences to the circumstances so  
9 that a sentence will punish those who are justly deserving of  
04:56 10 punishment, and a sentence will deter others from engaging in  
11 similar conduct. I'm placing Mr. Olofson essentially at the  
12 center of the range to help make that statement.

13 Now, after serving a 30-month term the Court is  
14 placing the defendant on supervision for a period of two years.

04:56 15 While on supervised release Mr. Olofson is to comply  
16 with the standard conditions which have been adopted by this  
17 court and, in addition, he's not to violate any federal, state  
18 or local laws. He's also required to report to the probation  
19 office in the district where he's released within 72 hours of  
04:57 20 being released by the Bureau of Prisons.

21 Of course, the defendant is not to possess any  
22 firearms or dangerous weapons while on supervision, and he is  
23 also precluded from possessing any illegal controlled substances  
24 while on supervision, as such possession will result in  
04:57 25 revocation of the supervision term and the defendant will be



1 obligated to serve a further term of incarceration.

2 The Court must emphasize the defendant shall refrain  
3 from unlawful use of controlled substances. Nonetheless, the  
4 Court is at this stage mindful that there is no indication by  
04:57 5 virtue of Mr. Olofson's conduct while on pretrial release and  
6 post-trial release, there's been no evidence of drug use.

7 In light of the defendant's financial circumstances  
8 the Court is not going to impose a fine. There is no reason for  
9 a fine to be imposed in this case because the defendant does not  
04:58 10 have the wherewithal to satisfy such an obligation. On the  
11 other hand, the defendant is required by the DNA Backlog  
12 Elimination Act as amended to submit a DNA sample under the  
13 guidance and supervision of his supervising probation officer.

14 The Mandatory Victims Restitution Act which was  
04:58 15 mentioned earlier requires the payment of a special assessment  
16 of \$100. That is due immediately and is payable in the Office  
17 of the Clerk of Court in room 362 of this building.

18 There is one other thing that I believe is  
19 appropriate, particularly in light of the arguments concerning  
04:59 20 Mr. Olofson's character, and in light of the facts concerning  
21 Mr. Olofson's conduct particularly on Halloween. The Court is  
22 going to require that the defendant engage in at least 30 hours  
23 of community service during each year of his supervision. That  
24 community service is -- does require that he get the approval of  
04:59 25 his supervising probation officer as to the nature of the

1 service. It is important that Mr. Olofson give back to the  
2 community in a positive way. If indeed he has engaged in the  
3 various activities as outlined here today by family and counsel,  
4 then this will be an opportunity for him to acquaint others with  
05:00 5 the importance of compliance with our laws and the need to be a  
6 good citizen.

7 Now, Mr. Olofson, you do have a right to appeal not  
8 only your conviction but also your sentence in this case. There  
9 are three ways in which you may do so.

05:00 10 First, you may ask the clerk of court to file a notice  
11 of appeal for you, provided you make the request on the record  
12 before you leave the courtroom here this afternoon.

13 Alternatively, your counsel can file a notice of  
14 appeal or you without your counsel's help may file the notice of  
05:00 15 appeal. Regardless of how the appeal is initiated, your trial  
16 counsel is obliged to represent you in the court of appeals  
17 unless or until he is relieved of that responsibility by the  
18 Seventh Circuit Court of Appeals which sits in Chicago.

19 If you would like to appeal and feel you do not have  
05:01 20 the wherewithal to pay the necessary filing fee, you may seek to  
21 appeal in forma pauperis, that is, without a payment of fees.  
22 Would you like the clerk to file the notice for you?

23 MR. FAHL: Mr. Olofson would request that the clerk  
24 file the notice of appeal on his behalf.

05:01 25 THE COURT: That will be done.

1           What is the government's position with respect to  
2     reporting? I note the defense has filed a motion seeking a stay  
3     pending appeal. Obviously an appeal has been requested, and so  
4     the request of the defense is now the subject for consideration.

05:01

5           Mr. Haanstad?

6           MR. HAANSTAD: Your Honor, I'm not sure if the court  
7     received the government's filing in connection with that motion.

05:01

8           THE COURT: I received your filing but I want to hear  
9     what you have to say in light of what has transpired on the  
10    record.

11          MR. HAANSTAD: I would just ask that whatever the  
12    reporting date typically is, if it's two weeks out that it be  
13    left at two weeks. I don't think there's any basis for staying  
14    the execution of his sentence pending appeal.

05:02

15          As I noted in our response to defendant's motion in  
16    that regard, he's not established a substantial question of law  
17    which is likely to result either in reversal or a new trial. He  
18    identifies I believe three issues but doesn't really explain how  
19    any of those are likely to result in either reversal or a new  
20    trial.

05:02

21          I think that given the state of the law with respect  
22    to those three issues, that is, given the already resolved  
23    question of the constitutionality, the Section 922(o), given the  
24    nearly insurmountable task that defendants typically face when  
25    challenging the sufficiency of the evidence, and given the fact

05:02

1 that this court instructed the jury consistent with the Supreme  
2 Court decision in United States vs. Staples, there's no basis  
3 for believing that there's a substantial question of law that's  
4 presented here such that the defendant should be granted bond  
05:03 5 pending appeal.

6 THE COURT: Is there anything you'd like to add,  
7 Mr. Fahl?

8 MR. FAHL: Just as I indicated earlier. I think that  
9 this -- the holding that originates out of this court's decision  
05:03 10 has created a sort of sea change for the way people can consider  
11 that ATF is going to treat AR-15 style rifles.

12 As such, including their relationship with Staples to  
13 these guns, the particular rulings 81-4 and what is actually  
14 required for something to become a machine gun. Because the  
05:03 15 ruling here is considered a departure from what has been the  
16 policy of the ATF in the past, that is going to be subject to  
17 the appeal, part of the appeal, and so a ruling on there one way  
18 or the other poses a substantial question. If the defense's  
19 argument is correct that this could not be a machine gun,  
05:04 20 obviously that would require coming back for an acquittal.

21 And we believe that, again, the law isn't that we have  
22 to show that you are going to succeed, but just that there is a  
23 substantial question. I think that is a substantial question,  
24 and especially in light of the Supreme Court's consideration of  
05:04 25 Heller which is going to re-examine the teeth as it were of the

1 second amendment in relation to the DC gun ban.

2 So, I believe there is a substantial question and so I  
3 think that prong is met.

4 THE COURT: I respectfully disagree with the arguments  
05:04 5 that you have advanced in support of a stay pending appeal. I  
6 would agree with what the government has asserted.

7 Further, it is not the intention of the court to  
8 direct that the defendant be remanded to the custody of the  
9 United States Marshal at this time. I'm certainly mindful of  
05:05 10 Mr. Olofson's conduct during the pendency of this case. He has  
11 towed the line. He has been respectful to the Pretrial Services  
12 people inasmuch as I have not received any negative reports, and  
13 he's certainly been here in a timely fashion for various  
14 proceedings and has handled himself appropriately. And so the  
05:05 15 Court will allow Mr. Olofson to self-report.

16 I do note several things in giving Mr. Olofson this  
17 opportunity:

18 One, if you have the opportunity to self-report,  
19 Mr. Olofson, that means you must pay for transport to whatever  
05:05 20 site is designated by the Bureau of Prisons.

21 Two, when you are allowed to self-report, failure to  
22 proceed as directed will cause you to be an escapee and you may  
23 well be prosecuted again for bail jumping.

24 Lastly, by giving you this opportunity to self-report  
05:06 25 on average it's taking more than 30 days to get a designated

1 institution as opposed to several weeks as suggested by the  
2 government. This will give you an opportunity, if you wish to  
3 avail yourself of that opportunity, to seek a stay from the  
4 Seventh Circuit Court of Appeals which may very well disagree  
05:06 5 with this court. But I believe that on the basis of this record  
6 there is no basis for this court to grant your request for a  
7 stay pending appeal.

8 Is there anything else from the defense?

9 MR. FAHL: Your Honor, we would request a placement  
05:06 10 from the Bureau of Prisons, a facility that's as close to the  
11 Eastern District of Wisconsin as possible.

12 THE COURT: I will recommend such a facility. Is  
13 there anything else from the government?

14 MR. HAANSTAD: No, Your Honor, thank you.

05:07 15 THE COURT: Is there anything else from Probation?

16 PROBATION OFFICER: No, Your Honor, thank you.

17 THE COURT: Very well, that concludes today's  
18 proceeding.

19 (Proceedings concluded at 5:07 p.m.)

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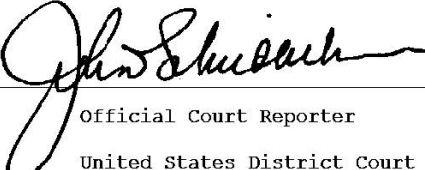
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1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF WISCONSIN  
3

4 I, JOHN T. SCHINDHELM, RMR, CRR, Official Court  
5 Reporter for the United States District Court, Eastern District  
6 of Wisconsin, do hereby certify that I reported the foregoing  
7 proceedings, and that the same is true and correct in accordance  
8 with my original machine shorthand notes taken at said time and  
9 place.  
10

11 Dated June 10, 2008, at Milwaukee, Wisconsin.

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14 Official Court Reporter  
United States District Court  
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